

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Yolo
(County File No. 028-ACP-YOL-02/03)

Administrative Docket No. 117

DECISION

**Department of Water Resources
1416 Ninth Street
P.O. Box 942836
Sacramento, California 94236-0001**

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners (CACs) may levy a civil penalty up to \$1,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Yolo CAC found that the appellant, Department of Water Resources, violated FAC section 12973. The commissioner imposed a total penalty of \$401 for the violation.

The Department of Water Resources appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides the appeal on the record before the hearing officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the hearing officer to support the hearing officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the hearing officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

Appellant's Contention

The appellant contends in its written submission, "Arguments of Appellant," the following:

1. The hearing officer's decision was based on erroneous conclusions and interpretations of the facts.
2. The hearing officer violated due process by allowing the Yolo CAC to allege, for the first time at the hearing, specific violations of the label.
3. The Yolo CAC lacks jurisdiction to bring this action against the appellant as a violation of FAC section 12973.
4. It was prejudicial error to rely upon a weather station located further from the damaged tomato planting sites than the weather station relied upon by the appellant.
5. The hearing officer dismissed the "only relevant testimony" of on-site observations of trained professionals relating to the weather conditions, an abuse of discretion and prejudicial error to the appellant.
6. Expert witnesses for the Yolo CAC's office had their testimony refuted by the appellant with regard to the "geometric distribution of crop damage to the Payne farms. "[The Yolo CAC's expert witnesses] suggested various scenarios to account for the lack of similar damage to the neighboring fields."
7. The appellant was not given adequate notice to prepare to defend itself against "the subject" of which they are alleged to have violated.
8. The Yolo CAC lacks statutory authority to assess penalties against the appellant under FAC section 12973, "because that subject is addressed by another section of the Code." (FAC section 12972)
9. The Yolo CAC imposed liability on the appellant without regard to negligence or any intent to cause harm, a strict liability standard.
10. The specific provisions of FAC section 12972 govern over the general provisions of FAC section 12973.
11. The language on the Garlon 4 label regarding spray drift is general guidance, not a strictly enforceable instruction.

FAC section 12973

FAC section 12973 provides, “The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner.”

The appellant makes numerous contentions, so for ease of review, the contentions will be discussed in the order presented.

1. *The hearing officer’s decision was based on erroneous conclusions and interpretations of the facts.* There are hours of oral testimony and numerous exhibits from both the appellant and the Yolo CAC’s office. The appellant’s contention is broad, vague, and lacks any discussable specifics. The appellant’s contention is without merit.

2. *The hearing officer violated due process by allowing the Yolo CAC to allege, for the first time at the hearing, specific violations of the label.* There is information in the record that the hearing officer stated that the appellant had “several months” to review the label. The section of the label that the appellant had “notice” is less than one inch below that section of the label that the appellant contends was not properly noticed. The relevant section of the label reads, “Avoid Injurious Spray Drift — Applications should be made only when there is little or no hazard from spray drift. Very small quantities of spray, which may not be visible may seriously injure susceptible plants. Do not spray when wind is blowing toward susceptible crops or ornamental plants near enough to be injured. It is suggested that a continuous smoke column at or near the spray site or a smoke generator on the spray equipment be used to detect air movement, lapse conditions, or temperature inversions (stable air). If the smoke layers or indicates a potential of hazardous spray drift, do not spray.” The label section that appellant contends is a “new alleged violation” states, “Do not apply Garlon 4 directly to, or otherwise permit it to come into direct contact with grapes, tobacco, vegetable crops, flowers, or other desirable broadleaf plants and do not permit spray mists containing it to drift onto them.”

These two label sections are very closely related. The label section that the appellant was provided with proper “notice” states in relevant part, “. . . Applications should be made only when there is little or no hazard from spray drift. Very small quantities of spray, which may not be visible may seriously injure susceptible plants. Do not spray when wind is blowing toward susceptible crops or ornamental plants near enough to be injured. . . .” The relevant section of the label that the appellant contends was a “new alleged violation” states, “Do not apply Garlon 4 directly to, or otherwise permit it to come into direct contact with grapes, tobacco, vegetable crops, flowers, or other desirable broadleaf plants and do not permit spray mists containing it to drift onto them.” This list of broadleaf plants is clearly related to and elucidates the previous reference to “susceptible plants” and, therefore, can be seen as incorporated by reference. The use of this label section by the commissioner’s advocate was reasonable and appropriate and is not sufficient cause to reverse the decision.

The appellant cites case law in its written argument relating to due process. In *People v. Lockheed Shipbuilding & Constr. Co.*, (1973) 35 Cal.App.3d 776, the court stated “that the statutes as applied violated due process in that they made no provision for a hearing” In *Stewart v. County of San Mateo*, (1966) 246 Cal.App.2d 273, the appellant was charged with using a client’s home and car, without permission, and the local constabulary revoked his private security license, based upon local police power. *Stewart* has some negative history, but has not been overruled. Both cases appellant cites are off point, and the fact patterns greatly differ from the facts at hand.

In this case, there was an adequately noticed hearing. The appellant knew the violation alleged was use in conflict with the label. The appellant had several months to review the label which clearly states, “*read the entire label before using.*”

3. *The Yolo CAC lacks jurisdiction to bring this action against the appellant as a violation of FAC section 12973.*

FAC section 12999.5(a) provides, “In lieu of civil prosecution by the director, the commissioner may levy a civil penalty against a person violating Division 6 (commencing with Section 11401), Article 10 (commencing with Section 12971) or Article 10.5 (commencing with Section 12980) of this chapter, Section 12995, Article 1 (commencing with Section 14001) of Chapter 3, Chapter 7.5 (commencing with Section 15300), or a regulation adopted pursuant to any of these provisions, of not more than one thousand dollars (\$1,000) for each violation.” Therefore, the appellant is incorrect that the Yolo CAC lacks jurisdiction, as FAC section 12973 is located in Division 7, Chapter 2, Article 10 of FAC.

4. *It was prejudicial error to rely upon a weather station located further from the damaged tomato planting sites than the weather station relied upon by the appellant.*

There is information in the record that the appellant obtained wind data from four different weather sites which the appellant’s witness testified substantiated the fact that one can move half a mile and get a different wind speed and direction reading, none of which would match the four weather station readings. There is also information in the record from the testimony of the Yolo CAC’s office witness who is familiar with the area that the “wind blows in 40 different directions on any given day.” Therefore, there was no prejudicial error, since the hearing officer relied upon evidence other than a single weather station.

5. *The hearing officer dismissed the “only relevant testimony” of on-site observations of trained professionals relating to the weather conditions, an abuse of discretion and prejudicial error to the appellant.*

The appellant’s witness stated that wind data was obtained from four different weather station sites which substantiates the fact that one can move half a mile and get a different reading, none of which would match the readings at the four weather stations. As stated above, there is testimony from the Yolo CAC’s witness that the wind blows from “40 different directions on any given day.” The appellant’s witness testified that the wind conditions change every half-mile, so the appellant had to rely on the “guys on the ground.” The record shows that the applicators of the Garlon 4 recorded the wind direction and speed at the day’s beginning, with no documentation of further monitoring until many hours later, if at all. There was testimony that the wind was checked before each tank mix was sprayed out. The appellant’s applicator testified that he relied on smoke stacks from tomato processors; however, it is general knowledge that tomatoes are not processed in April. There is nothing further in the record to document continuous monitoring of the wind on April 24, 2001, April 25, 2001, or April 26, 2001, by the appellant’s applicators other than the initial recording of the wind speed and direction on the Daily Spray Reports.

6. *Expert witnesses for the Yolo CAC’s office had their testimony refuted by the appellant with regard to the “geometric distribution of crop damage to the Payne farms. “[The Yolo CAC’s expert witnesses] suggested various scenarios to account for the lack of similar damage to the neighboring fields.”.*

The Yolo CAC’s office had two experts testify about the variations in crop damage. The speculation about crop types and timing of crop planting was incorrect; however, there is testimony in the record that the soil types were different — one damaged site being sandy soil, and the other lesser-damaged site was heavier soil. The appellant made several references to photographs; however, there is strong evidence in the record that photographs are not highly probative on this point. Both of the Yolo CAC’s witnesses made it very clear that the only way to ascertain the crop damage was to get into the field and look closely at the damaged plants, and both of the County’s witnesses testified that both fields showed phenoxy-like symptoms.

7. *The appellant was not given adequate notice to prepare to defend itself against “the subject” of which they are alleged to have violated.*

A proceeding before a hearing officer is adequate if the basic requirements of *notice* and *opportunity for hearing* are met. The sufficiency of the notice and hearing is determined by considering the purpose of the procedure, its effect on the rights asserted, and other circumstances. A hearing was held. The appellant was permitted to introduce evidence. Several witnesses testified. Numerous exhibits were introduced. Thus, it seems quite clear that the appellant was afforded an opportunity to be heard consistent with the requirements of due process.

8. *The Yolo CAC lacks statutory authority to assess penalties against the appellant under FAC section 12973 “because that subject is addressed by another section of the Code.” (FAC section 12972)*

As stated in paragraph three above, the Yolo CAC has authority to cite the appellant with a violation of FAC section 12973. CACs have discretion to cite applicators as they deem appropriate. The appellant is correct that FAC section 12972 describes the violation; however, FAC section 12973 refers to the label which incorporates specific language for drift prevention and provides detailed information to the applicator on how to avoid such drift.

9. *The Yolo CAC imposed liability on the appellant without regard to negligence or any intent to cause harm, a strict liability standard.*

There is information in the record that one of the damaged sites tested positive for trichlopyr, the active ingredient in Garlon 4. There is information in the record that the supervisor of the applicators stated that the tank mix included an anti-drift component; however, the record shows only one tank mix of Garlon 4 applied during April 24, 2001, through April 26, 2001, contained an anti-drift additive. There was evidence in the record that the tomato plants exhibited classic signs of phenoxy-like symptoms. The record does not show any other application of Garlon 4 or any other pesticide with the active ingredient of trichlopyr. The appellant applied Garlon 4 on the levee, the adjoining tomato field tested positive for the active ingredient in Garlon 4, and no other applications of Garlon 4 or a similar pesticide was applied in the area during the time in question. The rational inference from the evidence is that the Garlon 4 drifted onto the tomato fields. FAC does not specifically call for intent. The appellant contends that it did everything correct; however, there is evidence in the record that wind conditions were not adequately monitored, and the evidence shows that there was off-site movement of trichlopyr to the tomato field. Strict liability was not imposed, only responsibility.

There is also information in the record that details that Garlon 4 is an ester formulation of trichlopyr, which is a volatile formulation that, if the temperature is hot enough, will move off-site via volatilization. Finally, the Garlon 4 label states, “Very small quantities of spray, which may not be visible may seriously injure susceptible plants.” There is evidence in the record that this is exactly what occurred.

10. *The specific provisions of FAC section 12972 govern over the general provisions of FAC section 12973.*

As stated in paragraph eight above, the CAC’s have discretion to cite violators as they deem fit. In fact, FAC section 12973 is the more specific provision, as it incorporates the more detailed and specific instructions on the label.

11. *The Garlon 4 label's language regarding spray drift is general guidance, not a strictly enforceable instruction.*

It is well settled law that the "label is the law" and to use the pesticide in conflict with the label is actionable by both federal and state laws and regulations. The label provides detailed instructions to protect the applicator, the environment, and the consumer. The label is not guidance, but a legal document with the full force of the law, i.e., the Federal Insecticide, Fungicide, and Rodenticide Act; California FAC; and 3 CCR.

Conclusion

The record shows the commissioner's decision is supported by substantial evidence; therefore, there is no cause to reverse or modify the decision.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$401 fine.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

STATE OF CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION

By: original signed by
Paul Helliker
Director

Dated: April 27, 2004